



## **Agricultural Marketing Service**

### **7 CFR Part 1207**

**[Doc. No. AMS-SC-21-0032]**

## **Amendments to the United States Potato Board Membership and Assessment**

### **Methods**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule changes the approved data sources used to determine the number of National Potato Promotion Board (Board) seats, expands payment methods used to remit assessments to include electronic submission, and updates the table of Harmonized Tariff Schedule of the United States (HTS) codes and assessment rates for imported potatoes and potato products. Finally, this rule includes new language eliminating the need to amend the Potato Research and Promotion Plan to update the list of relevant HTS codes.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Alexandra Caryl, Branch Chief of Mid-Atlantic Region, Market Development Division, Specialty Crop Program, AMS, USDA, Stop 0244, 1400 Independence Avenue, SW., Room 1406-S, Washington, DC 20250-0244; telephone: (202) 253-4768; or electronic mail: [Alexandra.Caryl@usda.gov](mailto:Alexandra.Caryl@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule, affecting the Potato Research and Promotion Plan (Plan) (7 CFR part 1207) is authorized under the Potato Research and Promotion Act (Act) (7 U.S.C. 2611-2627).

**Executive Orders 12866 and 13563**

The U.S. Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

#### **Executive Order 13175**

This action has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The Agricultural Marketing Service (AMS) has assessed the impact of this final rule on Indian tribes and determined that this rule will not have tribal implications that require consultation under Executive Order 13175. AMS hosts a quarterly teleconference with tribal leaders where matters of mutual interest regarding the marketing of agricultural products are discussed. Information about the changes to the regulations were shared during a quarterly call on April 9, 2020, and tribal leaders were informed about the revisions to the regulation and the opportunity to submit comments. AMS is committed to working with the USDA Office of Tribal Relations to ensure meaningful consultation is provided, as needed, with regards to this change to the Plan.

#### **Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by

5 U.S.C. 804(2).

The Congressional Review Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 311 of the Act (7 U.S.C. 2620), a person subject to a plan may file a petition with USDA stating that such plan, any provision of such plan, or any obligation imposed in connection with such plan, is not in accordance with law and request a modification of such plan or to be exempted therefrom. Such person is afforded the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The Congressional Review Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition if the petitioner files a complaint for that purpose not later than 20 days after date of the entry of USDA's final ruling.

### **Background**

This rule amends the Plan's allowed sources of potato production data used to determine the number of Board seats to which each State is entitled. Additionally, this rule expands payment methods used to remit assessments to include electronic submission, and updates the table of HTS codes and assessment rates for imported potatoes and potato products. Finally, this rule inserts new language to avoid future amendments to the Plan if HTS numbers subject to assessment reflected in the table are changed and such changes are merely a replacement of previous numbers.

### **Data Sources for Board Membership**

The Plan became effective on March 9, 1972. Section 1207.320(b) of the Plan provides the formula used to determine how many Board member seats to which each State is entitled. Under the Plan every State is eligible to have a representative on the Board and is eligible to have additional members based on the potato production levels in that State. For each five million hundredweight of such production, or major fraction

thereof, produced within each State, such State shall be entitled to one member.

The Plan states potato production totals must come from the “latest Crop Production Annual Summary Report issued by the Crop Reporting Board, U.S. Department of Agriculture.” See § 1207.320(b). The Crop Production Annual Summary Report is currently issued by the National Agricultural Statistics Service (NASS).

In March 2020, USDA’s NASS and AMS communicated to the Board that NASS will no longer be collecting potato production data for the following ten states: Alaska, Illinois, Kansas, Maryland, Missouri, Montana, New Jersey, New York, North Carolina, and Virginia. In June 2020, NASS estimated the cost of collecting the data to approximately \$80,000 per year. The Board considered this estimate and concluded that the cost to collect this information will exceed the value of assessments collected from the ten States. Subsequently, the Board decided to temporarily freeze the number of seats for those ten States at their 2019 quantities so it could move forward with the assignment of Board member seats for 2020 nominations.

At the July Board 2020 meeting, Board staff presented to the Board’s Administrative Committee a summary of constraints related to the collection of production data. During a January 2021 meeting, Board staff further discussed the need to update the Plan with the Administrative Committee and made the recommendation to amend the Plan during a subsequent meeting on March 9, 2021.

The Board recommended to use production data from audited assessment reports in place of NASS data for states that have not been included in NASS reports.

As indicated in Table 1, this amendment will allow the Board to use audited assessment data in instances where NASS data is unavailable.

Table 1. NASS Production and Board Production (Board) and number of producer members by state.

State	NASS 2016 (cwt)	NASS 2017 (cwt)	NASS 2018 (cwt)	Board 2018 (cwt)	2016- 2018 NASS Avg. (1,000 cwt)	2016- 2018 NASS & Board Avg. (1,000 cwt)	2020 NASS Number of Members (cwt/ 5,000)	2020 NASS & Board Number of Members (cwt/ 5,000)
Alabama (AL)	-	-	-	70	-		1	1
Illinois(IL)	2,812	3,321	2,850	394	2,994	2,176	1	1
Kansas(KS)	1,260	1,558	1,419	483	1,412	1,100	1	1
Maryland (MD)	-	913	510	389	474	651	1	1
Missouri (MO)	2,410	2,423	1,665	1,012	2,166	1,948	1	1
Montana(MT)	3,685	3,774	3,830	149	3,763	2,536	1	1
New Jersey (NJ)	-	600	530	125	377	363	1	1
New York (NY)	3,552	4,032	4,118	899	3,901	2,828	1	1
North Carolina (NC)	2,992	3,473	2,318	1,702	2,928	2,722	1	1
Virginia (VA)	1,189	1,193	1,034	450	1,139	944	1	1

### **Assessment Payment Options**

This rule will allow electronic submission in the list of allowable methods of payment to remit assessments and remove references to drafts and money orders.

The Board staff stated that allowing electronic submission (e.g., bank transfer payments (Automated Clearing House) (ACH) or wire transfer payments) of assessments will improve and streamline operations by lowering the cost of processing mailed checks. This change will remove references to drafts and money orders as handlers are no longer using these forms of payment.

### **Harmonized Tariff Schedule Table**

Section 1207.510(b)(3) of the Plan contains an HTS table that reflects outdated HTS codes, assessment rates, and potato categories for imports.

Pursuant to Section 1207.327(b) of the Plan, the Board has the authority to recommend to AMS amendments to this Plan. To reduce **Federal Register** publication costs associated with amending the Plan to remain consistent with updated HTS codes,

the Board recommended removing the actual HTS chart from the Plan and replacing the HTS chart with a reference to the HTS codes, assessment rates and potato categories for imports.

AMS has adopted an alternative approach that includes amending the Plan by updating the current HTS chart and inserting new language to avoid future amendments to the Plan if an HTS number subject to assessment reflected in the table is changed and such change is merely a replacement of a previous number. This change will reduce future **Federal Register** publication costs associated with amending the Plan to remain consistent with future updated HTS numbers that have no impact on the description of potato involved.

### **Final Regulatory Flexibility Act Analysis**

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), AMS is required to examine the impact of the final rule on small entities. Accordingly, AMS has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. The Small Business Administration (SBA) defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$1 million and small agricultural service firms (handlers) as those having annual receipts of no more than \$30 million.

According to the Board, there were approximately 60 importers, 955 handlers, and 1,500 producers in 2020. These numbers are used in computations, explained in the following paragraphs, to develop estimates of the proportion of small and large businesses using the size criteria of the Small Business Administration.

Large agricultural producers under the criteria established by the SBA are those with \$1 million or more in annual sales. Producers that pay Board assessments have a minimum of 5 acres of potatoes.

The 2017 Agricultural Census reported 2,420 farms with 5 or more harvested acres of potatoes, of which 1,283 (53 percent) had annual sales of \$1,000,000 or more. Although there is a difference between the Board producer number and the Census farm number estimate, a majority the of potato producers responsible for paying assessments would likely be classified as large businesses according to the SBA criteria.

The SBA threshold size for a large agricultural service firm is \$30 million in annual sales. The Board estimate of the number of potato handlers in 2020 was 955. According to NASS, the total value of the 2020 U.S. potato crop was \$3.9 billion. Dividing \$3.9 billion by 955 yields an annual estimate of potato sales per handler of approximately \$4.1 million, well below the \$30 million, threshold for a large agricultural service firm.

Applying handler margins of twenty to fifty percent (representing a range of possible handler costs above the farm-level value) would increase that \$4.1 million sales per handler number to between \$4.9 and \$6.2 million, still well below the \$30 million SBA threshold. In addition, the NASS \$3.9 billion U.S. crop value for 2020 overstates to a moderate extent the crop value relevant to this computation because an unknown, but likely small, portion of that annual potato crop value was provided by farms with less than 5 harvested acres.

With estimated average annual sales per handler in a moderate range above or below \$4 million, it can be stated that a majority of potato handlers are small agricultural service firms, according to SBA criteria.

The Board received approximately \$14.5 million in 2020 assessments (\$0.03 per hundredweight, abbreviated as cwt) and reported that about 20 percent of those

assessments (\$2.9 million) were paid by potato importers. Dividing \$2.9 million by the \$0.03 per cwt assessment rate yields a potato import quantity estimate of 96.67 million cwt. Multiplying the 96.67 million cwt imported quantity by the NASS 2020 average U.S. grower price per cwt of \$9.30 yields a 2020 import value estimate of \$899 million. Dividing that imported potato value estimate by the number of importers (60) yields an average annual sales value per importer estimate of about \$15 million.

This average annual sales value per importer estimate was computed using an average farm-level price. It does not include a margin to account for importer costs of marketing, for which there is no publicly available information. Using the \$15 million figure, and applying a possible range of importer margins of 20 to 50 percent, would yield an annual average sales value per importer range of \$18.0 to \$22.5 million. Since these numbers are below the SBA threshold level of \$30 million, and assuming a normal distribution, a majority of potato importers are determined to be small agricultural service businesses.

This rule will amend §§ 1207.320, 1207.502, 1207.510 and 1207.513.

Regarding the economic impact of this final rule on affected entities, this action will impose no costs on producers, handlers, or importers. The changes are administrative in nature and will allow the Board to effectively carry out the requirements of the Plan.

In response to the discontinuation of NASS collection of potato production data for 10 States, USDA considered the following alternatives to the chosen amendment language: take no action and hold constant the production figures for the 10 States to the final year for which NASS published data; or fund NASS collection of data for the 10 States using Board resources. The first of these alternatives will result in the potential for Board representation that is inconsistent with domestic production. Potato production sees relatively high fluctuation from year to year. Consequently, distribution of Board



member seats based on a fixed production figure will prevent the Board from adequately reflecting the changes that occur in the industry over time; therefore, this is not a viable alternative. The second alternative will result in an annual cost to the Board of \$80,000 to restore the collection of potato production data by NASS for the 10 States which it has omitted. As this amount exceeds the total value of assessments collected from these 10 States, this is also not a viable alternative. The amendments encapsulated by this final rule will streamline and improve Board operations.

In accordance with OMB regulation [5 CFR part 1320], which implements information collection requirements imposed by the Paperwork Reduction Act of 1995 [44 U.S.C. 3501 et seq.], there are no new requirements contained in this rule.

As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Regarding outreach efforts, all the Board's meetings are open to the public and interested persons are invited to participate and express their views. No concerns were raised.

AMS has performed this final RFA analysis regarding the impact of this action on small entities.

A proposed rule concerning this action was published in the **Federal Register** on September 16, 2021 (86 FR 51626). A 30-day comment period ending October 18, 2021, was provided to allow interested persons to submit comments.

One comment was received in response to the proposed rule. This comment was immaterial to the topic of this rule. Therefore, no changes have been made to the proposed rule based on the comment received.

After consideration of all relevant matters presented, including the information and recommendation submitted by the Board, the comments received, and other relevant information, AMS has determined that this rule, as hereinafter set forth, is consistent with and will effectuate the purposes of the Act.

#### **List of Subjects in 7 CFR Part 1207**

Advertising, Agricultural research, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 7 CFR part 1207 as follows:

#### **PART 1207—POTATO RESEARCH AND PROMOTION PLAN**

1. The authority citation for 7 CFR part 1207 continues to read as follows:

**Authority:** 7 U.S.C. 2611-2627; 7 U.S.C. 7401.

2. Amend § 1207.320 by revising paragraph (b) to read as follows:

##### **§1207.320 Establishment and membership.**

\* \* \* \* \*

(b) Producer membership upon the Board shall be determined on the basis of the potato production reported in the latest Crop Production Annual Summary Report issued by the National Agricultural Statistics Service of the U.S. Department of Agriculture. If a State's potato production data is not provided by the National Agricultural Statistics Service, the Board may use an alternative data source that reliably reflects potato production in the United States. Unless the Secretary, upon recommendation of the Board, determines an alternate basis, for each five million hundredweight of such production, or major fraction thereof, produced within each State, such State shall be

entitled to one member. However, each State shall initially be entitled to at least one member.

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3. Amend § 1207.502 by revising paragraph (a) to read as follows:

**§1207.502 Determination of membership.**

(a) Pursuant to §1207.320 and the recommendation of the Board, annual producer memberships on the Board shall be determined on the basis of the average potato production of the 3 preceding years in each State as set forth in the Crop Production Annual Summary Reports issued by the National Agricultural Statistics Service of the U.S. Department of Agriculture. If a State's potato production data is not provided by the National Agricultural Statistics Service, the Board may use an alternative data source that reliably reflects potato production in the United States.

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4. Amend § 1207.510 by revising paragraph (b)(3) to read as follows:

**§1207.510 Levy of assessments.**

\* \* \* \* \*

(b) \*\*\*

(3) The Harmonized Tariff Schedule (HTS) categories and assessment rates on imported tablestock potatoes and frozen or processed potatoes for ultimate consumption by humans and on imported seed potatoes are listed in the following table. In the event that any HTS number subject to assessment is changed and such change is merely a replacement of a previous number and has no impact on the description of the potatoes, assessments will continue to be collected based on the new numbers.

	Assessment	
	Cents/cwt	Cents/kg
Tablestock potatoes, frozen or processed potatoes, and seed potatoes		
0701.10.0020	3.0	0.066

0701.10.0040	3.0	0.066
0701.90.1000	3.0	0.066
0701.90.5015	3.0	0.066
0701.90.5025	3.0	0.066
0701.90.5035	3.0	0.066
0701.90.5045	3.0	0.066
0701.90.5055	3.0	0.066
0701.90.5065	3.0	0.066
0710.10.0000	6.0	0.132
2004.10.4000	6.0	0.132
2004.10.8020	6.0	0.132
2004.10.8040	6.0	0.132
2005.20.0070	4.716	0.104
0712.90.3000	21.429	0.472
1105.10.0000	21.429	0.472
1105.20.0000	21.429	0.472
2005.20.0040	21.429	0.472
2005.20.0020	12.240	0.27
1108.13.0010	27.0	0.595

\* \* \* \* \*

5. Amend § 1207.513 by revising paragraph (c)(1) to read as follows:

**§1207.513 Payment of assessments.**

\* \* \* \* \*

(c) \*\*\* (1) Except as provided in paragraphs (b) and (d) of this section, each designated handler or importer shall remit assessments directly to the Board by check or electronic payment. Checks are to be made payable to the National Potato Promotion Board or the Board's official doing business as name. Payment is due not later than 10 days after the end of the month such assessment is due together with a report (preferably on Board forms) thereon.

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